IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HABER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Memoranda of Counsel for Plaintiff in Error Touching R. R. Co. vs. Husen, 95 U. S., 465, and Kimmish vs. Ball, 129 U. S., 217.

In the Husen case, 95 U. S., 465, where the Missouri-Texas fever statute was declared unconstitutional, the original record, which we have examined, shows that the complaint averred that all Texas cattle brought north during the period of the year covered by the statute were liable

to communicate Texas fever to the domestic cattle, and we think the record fairly shows that the testimony supported this allegation. (See vol. 5, Tr. of R. S. 1877, p. 4630.)

The Missouri supreme court had upheld the law on the ground that all Texas cattle were liable to communicate the disease.

The Illinois supreme court had, prior to the decision of this court in the Husen case, upheld the statute of Illinois similar to the Missouri statute on the same ground.

Therefore our contention is that the Husen case broadly denies the power of the State to forbid the transportation of cattle capable of communicating disease from one State into or through another State, and to now sustain the constitutionality of the Kansas statute will be to practically overrule the Husen case.

We have also examined the original record in Kimmish *vs.* Ball, 129 U. S., 217. It appears that the petition in that case claimed to recover under both sections, viz., 4058 and 4059, of the Iowa Code. The defendant demurred to the petition on the ground that both sections were violative of the commerce clause of the Constitution. The demurrer was sustained, but as the judges were divided in opinion as to the constitutionality of the second section (4059), the case was certified to this court on that question alone.

It therefore irresistibly appears that both judges of the court below (Love and Shiras) concurred in the unconstitutionality of the first section (4058). (See vol. 19, Tr. of R. S., p. 18391.)

It cannot be seriously doubted that the first section of the Iowa law, in so far as it prohibited the conveyance by a public carrier of any Texas cattle into the State, was

unconstitutional for the reasons given in the Husen case. The language of the Iowa law in the first section and the Missouri statute involved in the Husen case were substantially the same.

The Kansas supreme court in the case at bar says Kimmish *vs.* Ball controls this case and authoritatively affirms the validity of the Kansas statute; and counsel for defendants in error contend in their briefs and oral arguments that the Husen case is not controlling, and quote what was said of the Husen case in the opinion of Kimmish *vs.* Ball.

Our purpose in this short additional brief is to impress upon this court the importance of determining what was decided in the Husen case from its own record and opinion. It is not safe to ascertain from Kimmish *vs.* Ball what was decided in the Husen case, for the opinion in the Kimmish case fails to state the broad grounds on which the Husen case was decided.

Time has demonstrated as true what was contended by counsel for the constitutionality of the Missouri statute and what was decided by the supreme courts of Missouri and Illinois prior to the decision by this court of the Husen case, that all Texas cattle coming from within certain districts during certain periods of the year are liable to communicate Texas fever to domestic cattle.

What has been done by this court is more important than what may have been casually said in some particular opinion.

In the Husen case a statute of Missouri for its unconstitutionality was swept away on a principle subsequently followed by the Missouri and Illinois supreme courts, viz., that the public carrier, acting only as an agency of inter-

state commerce, could not be prohibited or unreasonably restricted by State legislation in the carriage of merchandise from one State to another.

The first question in the case at bar, therefore is, Is the Husen case to be dwarfed, limited, and narrowed till practically a great landmark in constitutional law disappears?

It will be a sad day for that doctrine of constitutional law, which upholds the exclusive power of Congress to regulate interstate commerce national in character, when the Husen case shall not be upheld in all its length and breadth.

JAMES HAGERMAN and
T. N. SEDGWICK,
Counsel for Plaintiff in Error.